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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted] 80

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

RHODES PHARMACAL COMPANY, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 767.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

RHODES PHARMACAL COMPANY, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported at 208 F. 2d 382 and appears in the record herein at R. 973.

JURISDICTION.

It is conceded that the Federal Trade Commission, petitioner herein, filed a timely petition for certiorari in this Court, which has jurisdiction under 28 U. S. C. 1254(1), as recited in the petition.

QUESTIONS PRESENTED.

The Court of Appeals said (208 F. 2d 382, 387-388):

> "We think the findings of the Commission are supported by substantial evidence. We agree with the conclusions of the Commission that petitioners were engaged in unfair and deceptive practice in commerce. We think that the cease and desist order should be enforced in the manner proposed, with the exception of sub-section (c) which should be modified. Orders of the Commission, which we are called upon to enforce, must not be indefinite or ambiguous. * * *"

The questions presented are:

1. Whether the Court of Appeals had power to modify the Commission's order to cease and desist.

2. Whether the Court of Appeals could modify the Commission's order to cease and desist, if it agreed that the findings and conclusions of the Commission were supported by substantial evidence.

3. Whether the findings and conclusions of the Commission were supported by substantial evidence.

4. Whether the Court of Appeals could modify the Commission's order to cease and desist, if the terms of the order were ambiguous, indefinite, vague or uncertain.

5. Whether the terms of the order to cease and desist issued by the Commission in this case were ambiguous, indefinite, vague or uncertain.

6. Whether the Court of Appeals could modify the Commission's order to cease and desist, if the remedy selected by the Commission was unreasonable or unduly drastic, harsh or burdensome.

7. Whether the remedy selected by the Commission in this case was unreasonable or unduly drastic, harsh or burdensome.

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8. Whether the Court of Appeals could modify the Commission's order to cease and desist, if the remedy selected by the Commission was unnecessary to correct the evil complained of and to protect the public, competitors and respondents.

9. Whether the order to cease and desist in this case was unnecessary to correct the evil complained of and to protect the public, competitors and respondents.

10. Whether the Court of Appeals could modify the Commission's order to cease and desist by re-writing it in a form agreeable to what the Commission thought necessary to correct its ambiguity, indefiniteness, vagueness or uncertainty.

11. Whether the Court of Appeals must remand to the Commission for further consideration every order which it finds to be ambiguous, indefinite, vague, uncertain, drastic, harsh, burdensome or unnecessary.

12. Whether by re-writing a cease and desist order of the Commission to correct its ambiguity, indefiniteness, vagueness or uncertainty, the Court of Appeals was substituting its judgment as to the scope of the remedy for that of the Commission within the meaning of the decisions of this Court.

13. Whether there are any "special and important reasons" for granting the writ in this case.

STATEMENT.

Respondents sell a drug product "Imdrin", in commerce, as that term is defined in the Federal Trade Commission Act. They advertise it in newspapers and on the radio.

The Federal Trade Commission brought administrative proceedings against respondents, charging that their said advertising was deceptive, in violation of the Act.

After protracted hearings, the Commission found that, while respondents so promised purchasers, "Imdrin" would not, among other things, cure rheumatism or arthritis, or provide adequate, effective, or reliable treatment for, or arrest the progress or correct the underlying causes of any such conditions. The Commission ordered respondents to cease and desist from making such claims to therapeutic effect. Such orders are not here in issue.

The Commission also found that "Imdrin" would afford only temporary and partial relief of minor aches and pains of rheumatism and arthritis, and accordingly ordered respondents to cease and desist from representing that "Imdrin" would afford any greater relief.

On review, the Court of Appeals for the Seventh Circuit, 208 F. 2d 382, 387 [7-9], said that "the findings of the Commission are supported by substantial evidence" (R. 979), but also, at p. 388 (R. 980), that:

> "It was overwhelmingly established in the case at bar that Imdrin affords relief for the pain and discomfort incident to many rheumatic and arthritic conditions. That duration of time that such relief was afforded differed with the individuals who used Imdrin. * * *"

The Court further found that the order of the Commission which would require respondents to advertise "Imdrin" as affording only "temporary" pain relief was "indefinite or ambiguous" (R. 979) and of "uncertain meaning" (R. 980), and that reference to "temporary" in the order should be "eliminated" (R. 979). Accordingly, the Court of Appeals modified the Commission's order so as to prohibit respondents from advertising only that "Imdrin" will afford any "permanent" relief of the aches and pains of such conditions (R. 980, 981), or "cure" the symptoms.

The Court of Appeals denied the Commission's petition for rehearing (R. 989), and the Commission brings this Petition for Certiorari.

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ARGUMENT.

The Federal Trade Commission ordered respondents to cease and desist from advertising, among other things, that their drug product "Imdrin" would afford other than "temporary" and "partial" relief of the "minor" aches and pains of rheumatism and arthritis (R. 959).

The Court of Appeals for the Seventh Circuit modified the order (R. 981) to excuse respondents' making these "indefinite or ambiguous" qualifications of "uncertain meaning" (R. 979-980). As modified, the order requires respondents, instead, to refrain from saying that said preparation affords any "permanent" relief of such aches and pains or "cure[s]" the symptoms or manifestations of such conditions (R. 980).

The Commission now asks this Court to grant a writ of certiorari to review these modifications, for three assigned reasons: (1) that the question of whether or not a court of appeals which modifies a cease and desist order, in so doing, may exceed its review powers under the Act, is important and recurring; (2) that the modification of the Commission's order *in this case* was improper, since the Commission alleges that it amounted to a substitution of the reviewing court's judgment as to the scope of necessary relief for that of the Commission; and (3) that no modification of the Commission's order was necessary *in this case*, as the Commission contends that its order was not ambiguous, uncertain, vague or indefinite.

I.

There Are No "Special and Important Reasons" for Granting the Writ, in This Case.

It is clear that the permissible scope of review of cease and desist orders issued by the Federal Trade Commission is a matter of importance, but it is not apparent wherein a review of this case on certiorari will contribute to the clarification of the applicable principle. This Court has already spoken in numerous cases, and petitioner's suggestion that a reviewing court may not substitute its judgment with respect to the scope of relief for that of the Commission may, within limits, be conceded.

The Commission stresses that this case is important, since questions of public health are involved. Such might be true were there here a question of the therapeutic effectiveness of a drug, but respondents have already been ordered to cease making all therapeutic claims for "Imdrin" (R. 958-959), and those parts of the Commission's order are not here attacked. The petition herein puts in issue no more of this case than respondents' claim that "Imdrin" affords symptomatic relief from pain. The effect of such claim upon public health is indirect, remote and conjectural.

It is true that the Commission has taken like action against certain other manufacturers of similar competitive drug products. On December 3, 1952, it issued a comparable cease and desist order against Dolcin Corporation, *et al.*, Docket No. 5692. However, since the filing of the Commission's petition for certiorari herein, the Court of Appeals for the District of Columbia Circuit, upon review, on July 1, 1954, likewise modified the Commission's order in that case. *Dolcin Corporation, et al.* v. *Federal Trade Commission*, D. C. Cir., 1954, No. 11,700. This as yet un-

published opinion in that case is attached hereto as Appendix A. While that Court is not completely in agreement with the Court of Appeals for the Seventh Circuit as to the proper terms of the modified orders in each instance, there is implicit in such action complete unanimity as to the right of courts of appeal to modify the Commission's chosen remedy by re-writing its order.

II.

The Court of Appeals Had Power to Modify the Commission's Order.

It is submitted that the modification of the Commission's order in our case was perfectly proper. It did not amount to a substitution of the judgment of the reviewing court for that of the Commission.

Both the Federal Trade Commission Act and the Administrative Procedure Act give the Court of Appeals power not only to affirm or reverse but also to modify cease and desist orders of the Federal Trade Commission. Federal Trade Commission Act, Sec. 5(c), 15 U. S. C. § 45(c); Administrative Procedure Act, Sec. 10(e), 5 U. S. C. § 1009(e). This power extends to the remedy. *Federal Trade Commission* v. *Royal Milling Co. et al.*, 288 U. S. 212 (1933); *Carter Products, Inc. et al.* v. *Federal Trade Commission*, 7 Cir., 1951, 186 F. 2d 821, 826; *Folds* v. *Federal Trade Commission*, 7 Cir., 1951, 187 F. 2d 658, 661.

A court of appeals may modify or set aside a cease and desist order issued by the Federal Trade Commission so as to eliminate or change the remedy selected by the Commission, where the Commission has acted arbitrarily or capriciously or abused its discretion or has acted unreasonably in its choice of that remedy. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612, 613 (1946);

Folds v. *Federal Trade Commission*, 7 Cir., 1951, 187 F. 2d 658, 661; *D. D. D. Corporation* v. *Federal Trade Commission*, 7 Cir., 1942, 125 F. 2d 679.

It is respectfully submitted that the Court of Appeals had the power, under the applicable statutes, to enter the modification in question. In the case of *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611, 612, 613, this Court did not repudiate, but cited with approval, its earlier decision in *Federal Trade Commission* v. *Royal Milling Co. et al., supra*, 288 U. S. 212 (1933). The latter was the last and leading case of this Court dealing with the power of a court to modify a Federal Trade Commission order. It affirmed that power. Since that 1933 decision, no Commission case has been decided in the Supreme Court which deviates in any way from the rule enunciated therein. Furthermore, a study of the cases in the Supreme Court since that time reveals no opinion which has even distinguished or mentioned the *Royal Milling* case with disfavor.

Federal Trade Commission v. *Royal Milling Co., supra*, cited with approval cases arising in various circuits in which orders of the Commission *had been* modified: *Fluegelman & Co.* v. *Federal Trade Commission*, 2 Cir., 1930, 32 F. 2d 59; *Federal Trade Commission* v. *Cassoff*, 2 Cir., 1930, 38 F. 2d 790; *Federal Trade Commission* v. *Good Grape Co.*, 6 Cir., 1930, 45 F. 2d 70.

Thereafter, courts in every circuit wherein similar cases arose applied the rule of modification established by the *Royal Milling Co.* case.[1]

1. *Federal Trade Commission* v. *Hires Turner Glass Co.*, 3 Cir., 1935, 81 F. 2d 362; *Etablissements Rigaud, Inc., et al.* v. *Federal Trade Commission*, 2 Cir., 1942, 125 F. 2d 590; *Bear Mill Mfg. Co.* v. *Federal Trade Commission*, 2 Cir., 1938, 98 F. 2d 67; *Federal Trade Commission* v. *Mid West Mills, Inc.*, 7 Cir., 1937, 90 F. 2d 723; *D.D.D. Corporation* v. *Federal Trade Commission*, 7 Cir., 1942, 125 F. 2d 679; *Lee Boyer's Candy* v. *Federal Trade Commission*, 9 Cir., 1942, 128 F. 2d 261; *Ardelle, Inc.* v. *Federal Trade*

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And *since* this Court's decision in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946), cease and desist orders have been modified in many circuits.[2]

The original Act creating the Federal Trade Commission was adopted in 1914. That Act was not substantially amended or changed in any respect until 1938 when, after careful consideration of various decisions which had been handed down by this Court and Circuit Courts in the intervening period, and upon request of the Federal Trade Commission, the Act was substantially amended to strengthen and enlarge the jurisdiction of the Federal Trade Commission and to include provisions relating to the finality of the Federal Trade Commission orders. The amending statute, introduced in the United States Senate, was reported by the Committee on Interstate Commerce to the 75th Congress, First Session.[3] That report contained a letter from the Acting Chairman of the Federal Trade Commission, dated February 11, 1936, discussing at length the proposed amendments and particularly the amendments to Section 5 of the Federal Trade Commission Act. Reference is therein made to many decisions of this Court

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Commission, 9 Cir., 1939, 101 F. 2d 718; *Gelb* v. *Federal Trade Commission*, 2 Cir., 1944, 144 F. 2d 580; and see all the cases cited under footnote 2.

2. *Folds* v. *Federal Trade Commission*, 7 Cir., 1951, 187 F. 2d 658; *Carter Products* v. *Federal Trade Commission*, 7 Cir., 1951, 186 F. 2d 821; *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 7 Cir., 1946, 152 F. 2d 478; *Standard Oil Co.* v. *Federal Trade Commission*, 7 Cir., 1949, 173 F. 2d 210, cert. granted 338 U. S. 665; *U. S. Printing & Novelty Co.* v. *Federal Trade Commission, D. C. Cir.*, 1953, 204 F. 2d 737; *Bork Mfg. Co.* v. *Federal Trade Commission*, 9 Cir., 1952, 194 F. 2d 611; *Lichtenstein* v. *Federal Trade Commission*, 9 Cir., 1952, 194 F. 2d 607; *Hamilton Mfg. Co.* v. *Federal Trade Commission*, D. C. Cir., 1952, 194 F. 2d 346; *Gold Tone Studios* v. *Federal Trade Commission*, 2 Cir., 1950, 183 F. 2d 257; *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 4 Cir., 1949, 176 F. 2d 974.

3. Senate Report No. 221, Vol. I, Senate Reports on Public Bills, etc., Serial No. 10076.

and of the Circuit Courts, but no reference whatever was therein made, nor any exception taken, to the existing decisions whereunder it had been held that the Circuit Court did have the power to modify orders of the Federal Trade Commission.[4]

The Act, as finally adopted after conference report of the two Houses of Congress, is of exceptional significance in that Congress *specifically retained* the power in the Circuit Court to modify orders of the Federal Trade Commission. In columnar form, we set forth below excerpts from the Act, more particularly portions of Section 5 thereof, as the same existed prior to the amendment in 1938 and as the same read after the 1938 statute.

38 STAT. 719.	52 STAT. 111.
Sec. 5 (p. 720):	Sec. 5(c).
* * *	
"* * * Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript *the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission* as in the case of an application by the commission for the	"(c) Any person, * * * or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, * * * by filing in the court, * * * a written petition praying that the order of the Commission be set aside * * *. Upon such filing of the petition and transcript *the court shall have jurisdiction* of the proceeding and of the question determined therein, *and* shall have *power to make and enter* upon the pleadings, evidence, and proceedings set forth in such transcript *a decree affirming, modifying or setting aside the order of the Commission, and enforc-*

4. These included *Federal Trade Commission* v. *Hires Turner Glass Co.*, 3 Cir., 1935, 81 F. 2d 362; *Federal Trade Commission* v. *Mid West Mills, Inc.*, 7 Cir., 1937, 90 F. 2d 723; *Fluegelman* v. *Federal Trade Commission*, 2 Cir., 1930, 32 F. 2d 59.

38 STAT. 719.

enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to *enforce, set aside, or modify* orders of the commission shall be exclusive."

52 STAT. 111.

ing the same to the extent that such order is affirmed, * * *."

"(d) The jurisdiction of the circuit court of appeals of the United States to *affirm, enforce modify, or set aside* orders of the Commission shall be exclusive."

Here, then, is an amendment to the Act expressly recognizing and reenacting the Court's power of modification.

It is a well recognized rule of statutory construction that where a legislature enacts a statute amending an existing law, it is presumed to have been cognizant of Court interpretations of that law. Any attempted alteration of judicial construction of the prior law must be expressed in clear and appropriate language, otherwise the statute will continue to be interpreted as theretofore by the courts. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500 (1933); *Hecht* v. *Malley*, 265 U. S. 144, 153 (1924); *Heald* v. *District of Columbia*, 254 U. S. 20 (1920); *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 644 (1917); *Latimer* v. *U. S.*, 223 U. S. 541 (1912); *Commissioner of Internal Revenue* v. *F. G. Bonfils Trust*, 10 Cir., 1940, 115 F. 2d 788.

Moreover, it is a basic rule of statutory construction that each word in a statute must be given its full significance. *U. S.* v. *Lexington Mill Co.*, 232 U. S. 399 (1913); *Washington Market Co.* v. *Hoffman*, 101 U. S. 112 (1879).

The *Royal Milling Co.* case was the supreme law of the land at the time of the enactment of the 1938 Wheeler-Lea Amendment to the Federal Trade Commission Act. Its doctrine was being followed by the various circuits. Had Congress intended to circumscribe the power of the court to modify orders of the Commission, it would have used

appropriate language to that end. It is presumed to have acted with knowledge of those decisions and their effect. However, rather than limiting the powers of the Court the legislature utilized language which clearly comprehended the Court's powers and manifestly extended them for future application.

It is therefore respectfully submitted that an analysis of the *Royal Milling Co.* case and the decisions in the various circuits following it, as well as the Federal Trade Commission Act itself, and the Act as amended, establishes beyond doubt that the Court of Appeals has the power to modify the instant order in the manner it did.

III.

The Court of Appeals May Modify the Commission's Order Even Though It Agrees With the Commission's Findings of Fact.

In view of such express congressional authority and mandate, as interpreted and followed by the courts, the Commission can scarcely contend that the Court of Appeals lacked power to modify its order. So the Commission implies that such power to modify is limited to those cases in which the Court disagrees with the Commission's findings of fact. The Commission emphasizes that in this case the Court held that the pertinent findings of the Commission were supported by substantial evidence.[5]

We do not think that Congress meant to so circumscribe the Court's power of review or to confine the Court's power to re-draft Commission orders to those cases in which the Court disagreed substantively with the Commission. Certainly, it did not expressly limit the power to modify such orders when it chose the language of the

5. Cf. Petition for a Writ of Certiorari, pp. 2, 4, 7, 9.

Wheeler-Lea Amendment to the Act. Yet Congress knew, in 1938, that in the *Royal Milling Co.* case, decided five years before, this Court had decided that the power to modify Commission orders existed *even when the Court agreed with the Commission's findings.* In the opinion in that case, 288 U. S. 212 (1933), Mr. Justice Sutherland, speaking for the Court, said (p. 217):

> "*Although we sustain the commission in its findings and conclusions* to the effect that the use of the trade names in question and the misstatements referred to constituted unfair methods of competition within the meaning of the act, and that its proceeding was in the interest of the public, *we think under the circumstances the commission went too far* in ordering what amounts to a suppression of the trade names. * * *" [Emphasis supplied.]

In *Federal Trade Commission* v. *Good Grape Co.*, 6 Cir., 1930, 45 F. 2d 70, cited in this Court's opinion in the *Royal Milling Co.* case, the Court of Appeals said (p. 72):

> "The[se] findings are supported by the evidence."

But it modified the Commission's order.

Since the *Royal Milling Co.* case, various courts of appeal have modified cease and desist orders while they expressed agreement with the Commission's findings.[6]

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6. *Carter Products* v. *Federal Trade Commission*, 7 Cir., 1951, 186 F. 2d 821; *D.D.D. Corp.* v. *Federal Trade Commission*, 7 Cir., 1942, 125 F. 2d 679; *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 7 Cir., 1946, 152 F. 2d 478; *Standard Oil Co.* v. *Federal Trade Commission*, 7 Cir., 1949, 173 F. 2d 210, cert. granted 338 U. S. 865; *DeForest's Training, Inc.* v. *Federal Trade Commission*, 7 Cir., 1943, 134 F. 2d 819; *Salt Producers Assn.* v. *Federal Trade Commission*, 7 Cir., 1943, 134 F. 2d 354; *Hamilton Mfg. Co.* v. *Federal Trade Commission*, D. C. Cir., 1952, 90 U. S. App. D. C. 169, 194 F. 2d 346; *U. S. Printing & Novelty Co.* v. *Federal Trade Commission*, D. C. Cir., 1953, 204 F. 2d 737; *Bork Mfg. Co.* v. *Federal Trade Commission*, 9 Cir., 1952, 194 F. 2d 611; *Lichtenstein* v. *Federal Trade Commission*, 9 Cir., 1952, 194 F. 2d 607; *Gold Tone Studios* v. *Federal Trade Commission*, 2 Cir., 1950, 183 F. 2d 257; *Bond Crown & Cork Co.* v. *Federal Trade*

In *Federal Trade Commission* v. *Hires Turner Glass Co.*, 3 Cir., 1936, 81 F. 2d 362, the Court of Appeals likewise modified the order of the Commission, even though it recognized that the findings of the Commission were supported by substantial evidence. In so doing, that Court made clear (p. 363):

> "In approaching these issues, we bear in mind the admonition in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73, * * * where the Supreme Court said: ' "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive." 15 U. S. C. § 45 * * *. The Court of Appeals [64 F. (2d) 618], though professing adherence to this mandate, honored it, we think, with lip service only. * * *' "

The Court of Appeals felt that the kind of modification of the Commission's order it there proposed to make did not fall within the statutory language quoted. More important, Congress knew of this decision when it amended the Act in 1938 but failed to proscribe such practice, clear evidence of its intent in that behalf.

Again, in *Etablissements Rigaud, Inc., et al.* v. *Federal Trade Commission*, 2 Cir., 1942, 125 F. 2d 590, the Court accepted the findings of the Commission but nevertheless modified not only the language but the *substance* of the order.

And in *Bear Mill Mfg. Co.* v. *Federal Trade Commission*, 2 Cir., 1938, 98 F. 2d 67, 68-69, the Court said:

> "* * * we cannot say that the findings are not sup-

Commission, 4 Cir., 1949, 176 F. 2d 974; *Sweets Co. of America* v. *Federal Trade Commission*, 2 Cir., 1940, 109 F. 2d 296; *Ultra-Violet Products, Inc.* v. *Federal Trade Commission*, 9 Cir., 1944, 143 F. 2d 814; *Standard Container Mfgrs. Assn.* v. *Federal Trade Commission*, 5 Cir., 1941, 119 F. 2d 262, 266; *Gimbel Bros.* v. *Federal Trade Commission*, 2 Cir., 1941, 116 F. 2d 578, 579-580; *Lee Boyer's Candy* v. *Federal Trade Commission*, 9 Cir., 1942, 128 F. 2d 261; *Federal Trade Commission* v. *Chas. N. Miller Co.*, 1 Cir., 1938, 97 F. 2d 563.

> ported by substantial evidence or that the order to cease and desist * * * which the Commission issued in consequence of the findings was without foundation."

But it modified the Commission's cease and desist order. To like effect see *Federal Trade Commission* v. *Mid West Mills, Inc.*, 7 Cir., 1937, 90 F. 2d 723.

In view of these many decisions, both before and after the 1938 Amendment of the Federal Trade Commission Act, and before and after the decision of this Court in the *Siegel* case, *ante*, it cannot seriously be urged that the Court of Appeals cannot change the terms of a cease and desist order issued by the Commission if it agrees with the Commission's findings. If the Court of Appeals disagrees with such findings, it must, of course, either set aside the Commission's order or at least modify same. But if the Court believes that the Commission's findings are proper, it may still change the Commission's order, if it also believes the Commission did not act reasonably in its selection of an appropriate remedy.

It is noteworthy that we are unable to find any case in which a Court of Appeals referred to the Commission's action as "arbitrary", "capricious" or "unreasonable." But if these are the only permissible bases upon which to predicate a reversal or modification, it would seem that a finding of some abuse of discretion is implicit in every such action. The closest approach to a direct reprimand of the Commission which we have thus far encountered is that in *Folds* v. *Federal Trade Commission*, 7 Cir. 1951, 187 F. 2d 658, 661, where the Court said:

> "The trial examiner made a very sensible and sound recommendation based upon the entire record. It is difficult to understand why the Commission did not follow his recommendation, instead of making a mountain out of a pimple as they have attempted to do in this case."

IV.

The True Rule: An "Allowable Judgment" by the Commission in Its Selection of a Remedy Requires the Choice of One That Is Reasonable and Not Unduly Drastic, Harsh or Burdensome.

We agree that the true rule as to the scope of judicial review of Federal Trade Commission orders is reflected in the statement of this Court in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611 (1946) that:

> "* * * judicial review is limited * * * to ascertain[ing] whether the Commission made an allowable judgment in its choice of the remedy."

We do not think this Court, by such language, meant to preclude review of the remedy selected by the Commission or to deprive the Court of Appeals of its statutory power and obligation to modify in a proper case. It meant only to effectuate Congressional intent to repose in the agency such sound discretion as its expertise merits, in this case the initial determination of what remedy to invoke. True, it meant to prescribe a narrower standard of review than might otherwise have been supposed to obtain; but it did not mean to foreclose review of the remedy.

What constitutes "an allowable judgment" in the Commission's choice of a remedy is not clear, but this Court sheds some light on the subject when it says, 327 U. S. 608, 612:

> "the courts will * * * interfere * * * where the remedy selected has no reasonable relation to the unlawful practices found to exist."

From this we see that an allowable judgment as to the choice of a remedy must be subjected to the test of logical

inference; but that alone will not be determining. It should be remembered that in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946), the remedy selected by the Commission would have required petitioner to cease and desist from using the word "Alpacuna" to describe its coats. Since the use of this name was a practice complained of as misleading, it would have been entirely logical, upon a finding that such representation was deceptive, to proscribe the use of that term, and the Commission elected so to do. Nevertheless, this Court reversed, saying (pp. 612-613):

> "The problem is to ascertain whether that policy [to avoid "drastic means" where unnecessary] and the other policy of preventing unfair or deceptive trade practices can be accommodated. * * * the Commission seems not to have considered whether * * * the ends of the Act could be satisfied [otherwise] and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. * * *"

It would appear from the foregoing that the Commission's order must not be unduly drastic, harsh or burdensome. See also *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217 (1933); *Gimbel Bros.* v. *Federal Trade Commission*, 2 Cir., 1941, 116 F. 2d 578, 579 [6]. And the Commission must have considered and rejected, for reasonable cause, alternative possible remedies.

And it should be remembered that in the *Siegel* case, *supra*, the Commission in its Brief, pp. 20, 21 and 22, similarly urged:

> "The Commission, with its valid finding before it, was entitled to conclude that nothing short of prohibition of the term 'Alpacuna' would give assurance of preventing the deception springing from the use of this name. * * * * * * If the Commission's orders

are to possess any vitality, *the restraint must be complete and unqualified* * * *"

* * * * *

"Petitioner's attempt (Br. 8-9) to fasten upon the Commission the requirement that there must be *substantial evidence of the inadequacy of milder remedies* in order to sustain the remedial provision contained in a Commission order, must fail in this case * * * **Factual determinations are not involved in prescribing a remedy,** * * * but decisions primarily of policy—in short, discretionary decisions which lie at the heart of the administrative process and are not to be disturbed by courts unless arbitrarily or irrationally made."

It would appear that this Court rejected this contention, at least in part, holding that the Commission's restraint need not be complete and unqualified and that the inadequacy of milder remedies must affirmatively appear.

V.

The Modified Order Sufficiently Preserves the Commission's Justifiable Intent to Protect the Public, Competitors and Respondents. It Is Not a Substitution of Judgment.

In this case, the Court of Appeals changed the Commission's order to prohibit respondents' saying that "Imdrin" would afford "permanent" pain relief, instead of requiring them affirmatively to specify that the pain relief afforded would be only "temporary". The antonym of "permanent" is "temporary". Webster's New International Dictionary, 2d Ed., 1934, p. 1824. Therefore, under the modified order, any claim to pain relief which petitioners may make short of "permanent" relief, must be equated to "temporary". These adjectives refer only to the duration of the relief afforded. Intermediate gradations involve unwarranted hair-splitting.

When the Commission expresses fear that respondents may circumvent its original order while complying with the Court's modification, by claiming that "Imdrin" affords "extended" or "substantial" pain relief (Pet. 12), it neglects to point out that these terms [which had not occurred to respondents] are likewise indefinite, vague and ambiguous.

The Commission does not satisfactorily explain *how* respondents may practically comply with its order prohibiting reference to pain relief in excess of "temporary" without using that objectionable term. It takes refuge instead in the general propositions that "the Commission's order does not require [respondents] to do so" and "the order is not bound to chart a course for petitioner" (Pet. 15). The Commission has itself often urged that *unqualified* claims to a given effect import permanency. See *International Parts Corporation* v. *Federal Trade Commission*, 7 Cir., 1943, 133 F. 2d 883; *D. D. D. Corporation* v. *Federal Trade Commission*, 7 Cir., 1942, 125 F. 2d 679; *Carter Products* v. *Federal Trade Commission*, 7 Cir., 1951, 186 F. 2d 821. It may be assumed that the Commission would take the same position were respondents here to use the word "relief" alone. We submit that compliance with such an order is otherwise practically and logically impossible.

On the other hand, if respondents were to claim that "Imdrin" affords relief from "severe" pains, that representation would not refer to the duration of the relief, but to the intensity of the pain, something equally nebulous (R. 217-218). The modified order of the Court of Appeals likewise eliminated the Commission's requirement that respondents refer only to "minor" pains. While the Court assigned no specific reason for so doing, such is not indispensable, and it may be assumed that this elimina-

tion was also made for the reason that such term was vague, ambiguous and indefinite.

And if respondents were to claim that "Imdrin" will "stop" swelling or stiff joints, the Commission would immediately insist that respondents were advertising a "cure of the symptoms" of rheumatism and arthritis, *D. D. D. Corp.* v. *Federal Trade Commission*, 7 Cir., 1942, 125 F. 2d 679, 682, something which is prohibited by the modified order (R. 980).

Therefore, it cannot be said that the Court of Appeals re-wrote the order of the Commission in such manner as to substitute its judgment as to the remedy for that of the Commission or to change the intent of the order or narrow its scope any more than necessary to eliminate the ambiguity and to give effect to the Court's criticism of the Commission's action. To such an extent, a limited counter-suggestion of the terms of an appropriate order is inevitable and inherent in the reviewing court's power to "modify" the order. Surely it is not suggested that *every* case in which the Court disagrees with the Commission's choice of a remedy must be remanded to the Commission for further deliberation and consideration of other remedies likewise possibly unacceptable to the Court and subject to further rejection. Such a process could continue *ad infinitum*. We are confident that Congress did not so intend.

VI.

The Commission's Original Order Was Definitely Ambiguous.

Paragraph 1(c) of the Commission's order would have required respondents to cease and desist from advertising that "Imdrin" would afford more than "temporary" pain relief. The Commission argues that this adjective is not

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ambiguous or uncertain and that "this word did not render the Commission's order vague or indefinite, and that the Court of Appeals erred in holding that modification of the order was necessary." (Pet. 14.) We think the term is patently indefinite, uncertain, vague and ambiguous.

The Court of Appeals correctly observed, 208 F. 2d 382, 388:

> "In *Carter Products, Inc.* v. *Federal Trade Commission*, 7 Cir., 186 F. 2d 821, 826, we stated, ' * * * this court in *D. D. D. Corp.* v. *Federal Trade Commission*, [7 Cir., 125 F. 2d 679] * * * disapproved of the use of the word "temporary" because of its *very uncertain* meaning. We pointed out that *it might mean only a few minutes*, yet experts testifying before the Commission in this case admitted that Arrid's deodorant properties are effective at least three to six hours. We think in the case at bar, as we did in the D. D. D. case that *protection of the public does not require petitioners to use the word "temporary" or "temporarily", and that to require its use would be unfair to the petitioners* in representing the truth as to Arrid.' In *D. D. D. Corp.* v. *Federal Trade Commission*, 7 Cir., 125 F. 2d 679, 682, we said, 'We are also of the view that the word "temporary" as used in * * * the Commission's order should be eliminated. We see no reason why petitioner should not be permitted to represent its product as a relief for itching. It does not cure either the itch or its cause, but it does afford relief. * * * *The word "temporary" carries an uncertain meaning.*' " [Emphasis supplied.]

And in *Dolcin Corporation, et al.* v. *Federal Trade Commission*, D. C. Cir., 1954, No. 11,700, thus far reported only in Commerce Clearing House Trade Regulation Reporter, ¶ 67,670 *et seq.* (Reproduced in Appendix A hereto), the Court of Appeals for the District of Columbia, on July 1, 1954, in modifying a substantially identical order, said:

> "Paragraph 1(c) of the order directs petitioners to

cease and desist representing 'that said preparation will afford any relief of severe aches, pains, and discomforts of * * * any kind of arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such condition *in excess of affording temporary relief of minor aches, pains or fever.*'

"Petitioners urge that this provision is unduly restrictive, in that their product does give a measure of relief that is more than temporary, and in cases of pain that are more than minor. The record contains much to support this position, though it also supports the Commission's finding that Dolcin 'will have no significant effect upon severe aches, pains and discomforts' of the conditions involved. The Commission says that petitioners in complying with the order as written, 'are not required to use the word "temporary," [Cf. Petition for Certiorari herein, p. 15, footnote 10]. They can comply by merely avoiding the use of such phrases as "prolonged relief".' (Br. 39.) Although the Commission does not say so, like reasoning would seem to permit petitioners to avoid using the word 'minor'. *This leaves an undesirable ambiguity.* As we recently said: 'It seems to us to be better procedure, in that it will eliminate confusion and possible misunderstanding, to modify the order in accordance with a clear statement of its intended meaning, rather than to construe an admittedly *ambiguous* phrase.' *Hamilton Mfg. Co.* v. *Federal Trade Commission*, 90 U. S. App. D. C. 169, 194 F. 2d 346 (1952)." [Emphasis supplied.]

It would thus appear that the Courts of Appeal of two circuits are in complete agreement as to the ambiguity of the word "temporary" when used in the context employed in these cases.

But the Commission points out that it "could have prohibited respondents from advertising that 'Imdrin' would give relief for more than an hour", since one witness testified that in his opinion such would be its maximum dura-

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tion. (Pet. 15.) This was the only witness who so specified, and we doubt that such testimony provided more than a scintilla of evidence of such probative quality as would substantially support a finding to that effect. Particularly is such the case in view of the fact that this Court may on appeal judicially notice that the period of relief afforded by a minimum dose of common aspirin ordinarily exceeds the hour mentioned. And it cannot be said that an appreciable number of persons would not understand the term "temporary" to mean less than even one hour. Neither the Court of Appeals for the Seventh Circuit nor that for the District of Columbia saw fit to modify the orders in any of the above cases by specifying the number of hours it thought "temporary", although there was such evidence in each case.

Moreover, we are not here concerned with what the Commission believes it had power to order, if it so desired. We are concerned only with the effect of the terms of what it ordered. In speaking of the terms of a statute, Mr. Justice Sutherland, dissenting in *Ferry* v. *Ramsey*, 277 U. S. 88, 97 (1928), said:

> " * * * I should have supposed the liability of the director must be measured by what the state has *enacted* and not by what it had the *power* to enact." [Emphasis supplied.]

It would therefore appear that there is little doubt but what the cease and desist order, as originally drafted by the Commission was ambiguous and unclear and that the Court of Appeals was under the duty to revise it as it did.

Conclusion.

The case was correctly decided in accordance with established principles, and there is no question warranting further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys for Respondents.

July, 1954.

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APPENDIX A.

DOLCIN CORPORATION, AND VICTOR VAN DER LINDE, GEORGE SHIMMERLIK, AND ALBERT T. WANTZ, INDIVIDUALLY AND AS OFFICERS OF DOLCIN CORPORATION v. FEDERAL TRADE COMMISSION.

In the United States Court of Appeals for the District of Columbia Circuit. No. 11700. Decided July 1, 1954.

On petition for review of order of the Federal Trade Commission.

* * * * *

III.

[*Contention of Inadequate Evidence.*]

Petitioners earnestly contend that the provisions of the Commission's order[11] are not adequately supported by the evidence.

At the hearing Dolcin offered considerable testimony in support of its advertising. There was conflicting evidence on many points. But we do not think the Commission resolved the conflict in an unreasonable manner. Subject to what is about to be said concerning paragraph 1(c) of the order, we think the findings and order were supported, on the record as a whole, by substantial evidence. They must, therefore, be upheld, unless they are defective in other respects. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951).

Paragraph 1(c) of the order directs petitioners to cease and desist representing "that said preparation will afford

11. See note 1, *supra*.

any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such conditions in excess of affording temporary relief of minor aches, pains, or fever."

Petitioners urge that this provision is unduly restrictive, in that their product does give a measure of relief that is more than temporary, and in cases of pain that are more than minor. The record contains much to support this position, though it also supports the Commission's finding that Dolcin "will have no significant effect upon severe aches, pains and discomforts" of the conditions involved. The Commission says that petitioners, in complying with the order as written "are not required to use the word 'temporary'. They can comply by merely avoiding the use of such phrases as 'prolonged relief.'" (Br. 39.) Although the Commission does not say so, like reasoning would seem to permit petitioners to avoid using the word "minor." This leaves an undesirable ambiguity. As we recently said: "It seems to us to be better procedure, in that it will eliminate confusion and possible misunderstanding, to modify the order in accordance with a clear statement of its intended meaning, rather than to construe an admittedly ambiguous phrase." *Hamilton Mfg. Co.* v. *Federal Trade Commission* [1953 TRADE CASES ¶ 67,216], 90 U. S. App. D. C. 169, 194 F. 2d 346 (1952).[12]

We think that there will be less ambiguity, and closer conformity to the Commission's findings, if paragraph 1(c) of the present order is modified to read as follows:

"that said preparation will afford significant relief of

12. In *Rhodes Pharmacal Co.* v. *Federal Trade Commission* [1953 Trade Cases ¶ 67,607], 208 F. 2d 382 (1953), the Seventh Circuit had before it an order similar to the present, issued with respect to a drug called "Imdrin," of much the same formula as Dolcin. The court modified the order, but in a manner which we do not consider would be justified on the record in the present case.

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severe aches, pains and discomforts or permanent relief of any aches, pains and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording relief of aches, pains or fever within the foregoing limits;''

* * * * *

The order of the Commission will accordingly be affirmed, as modified, and the enforcement thereof, as modified, will be ordered; additional evidence shall be taken in accordance with this opinion.